

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AETNA LIFE INSURANCE COMPANY, on
behalf of LEHMAN BROTHERS HOLDINGS,
INC.,

Plaintiff,

v.

THOMAS KOHLER and DIANE KIMSEU
KOHLER,

Defendants.

No. C 11-0439 CW

ORDER DENYING
DEFENDANTS' MOTION
TO DISMISS AND
DENYING AS MOOT
PLAINTIFF'S MOTION
TO STRIKE PORTIONS
OF DEFENDANTS'
MOTION TO DISMISS
(Docket Nos. 12 and
17)

Plaintiff Aetna Life Insurance Company, on behalf of Lehman Brothers Holdings, Inc., brings a claim under section 502(a)(3) of the Employment Retirement Insurance Security Act (ERISA), 29 U.S.C. § 1132(a)(3), to recover funds from Defendants Thomas Kohler and Diane Kimeseu Kohler. Defendants move to dismiss Aetna's complaint. Aetna opposes the motion and moves to strike portions of Defendants' motion to dismiss. Defendants oppose Aetna's motion to strike. The motions will be decided on the papers. Having considered the papers submitted by the parties, the Court DENIES Defendants' motion and DENIES as moot Aetna's motion to strike.

BACKGROUND

Aetna is the administrator and fiduciary of the Lehman Brothers Holdings, Inc. Benefits Plan, which is a self-funded plan governed by ERISA. Defendants are husband and wife. Ms. Kimseu Kohler was employed by Lehman Brothers and was a participant under the Plan. Mr. Kohler was a covered dependent. As relevant to Aetna's claim to recover funds from Defendants, the Summary Plan

1 Description (SPD) for the Plan provided,

2 Subrogation

3 Immediately upon paying or providing any benefits under this
4 plan, the plan shall be subrogated to (stand in the place of)
5 all rights of recovery a Covered Person has against any
6 Responsible Party with respect to any payment made by the
7 Responsible Party to a Covered Person due to a Covered
8 Person's injury, illness, or condition to the full extent of
9 benefits provided or to be provided by the plan.

10 Reimbursement

11 In addition, if a Covered Person receives any payment from any
12 Responsible Party or Insurance Coverage as a result of an
13 injury, illness, or condition, the plan has a right to receive
14 from, and be reimbursed by, the Covered Person for all amounts
15 this plan has paid and will pay as a result of that injury,
16 illness, or condition, up to and including the full amount the
17 Covered Person receives from any Responsible Party.

18 Constructive Trust

19 By accepting benefits (whether the payment of such benefits is
20 made to the Covered Person or made on behalf of the Covered
21 Person to any provider) from the plan, the Covered Person
22 agrees that if he or she receives any payment from any
23 Responsible Party as a result of an injury, illness, or
24 condition, he or she will serve as a constructive trustee over
25 the funds that constitutes such payment. Failure to hold such
26 funds in trust will be deemed a breach of the Covered Person's
27 fiduciary duty to the plan.

28 Lien Rights

Further, the plan will automatically have a lien to the extent
of benefits paid by the plan for the treatment of the illness,
injury, or condition for which the Responsible Party is
liable. The lien shall be imposed upon any recovery whether
by settlement, judgment, or otherwise related to the treatment
for any illness, injury, or condition for which the plan paid
benefits. The lien may be enforced against any party who
possesses the funds or proceeds representing the amount of
benefits paid by the plan including, but not limited to, the
Covered Person, the Covered Person's representative or agent;
Responsible Party; Responsible Party's insurer,
representative, or agent; and/or any other source possessing
funds representing the amount of the benefits paid by the
plan.

First-Priority Claim

By accepting benefits (whether the payment of such benefits is
made to the Covered Person or made on behalf of the Covered
Person to any provider) from the plan, the Covered Person
acknowledges that this plan's recovery rights are a first
priority claim against all Responsible Parties and are to be
paid to the plan before any other claim for the Covered
Person's damages. This plan shall be entitled to full

1 reimbursement on a first-dollar basis from any Responsible
2 Party's payments, even if such payment to the plan will result
3 in a recovery to the Covered Person which is insufficient to
4 make the Covered Person whole or to compensate the Covered
5 Person in part or in whole for the damages sustained. The
6 plan is not required to participate in or pay court costs or
7 attorneys fees to any attorney hired by the Covered Person to
8 pursue the Covered Person's damage claim.

9 Cooperation

10 The Covered Person shall fully cooperate with the plan's
11 efforts to recover its benefits paid. It is the duty of the
12 Covered Person to notify the plan within 30 days of the date
13 when any notice is given to any party, including an insurance
14 company or attorney, of the Covered Person's intention to
15 pursue or investigate a claim to recover damages or obtain
16 compensation due to injury, illness, or condition sustained by
17 the Covered Person. The Covered Person and his or her agents
18 shall provide all information requested by the plan, the
19 Claims Administrator or its representative including, but not
20 limited to, completing and submitting any applications or
21 other forms or statements as the plan may reasonably request.
22 Failure to provide this information may result in the
23 termination of health benefits for the Covered Person or the
24 institution of court proceedings against the Covered Person.

25 The Covered Person shall do nothing to prejudice the plan's
26 subrogation or recovery interest or to prejudice the plan's
27 ability to enforce the terms of this plan provision. This
28 includes, but is not limited to, refraining from making any
settlement or recovery that attempts to reduce or exclude the
full cost of all benefits provided by the plan.

Compl., Ex. A, at 40-41.

The following allegations are contained in Aetna's complaint,
unless otherwise stated.

On July 4, 2008, Mr. Kohler was injured in a traffic accident
involving Lise Warren. The Plan paid out \$147,986.76 to cover Mr.
Kohler's medical expenses.

In November 2008, The Rawlings Company, LLC, on behalf of
Aetna, notified Mr. Kohler of his duty to inform Aetna of any claim
he intended to bring based on the July 2008 accident. Rawlings
also informed Mr. Kohler of Aetna's "right to reimbursement from
any settlement or other payment received as a result of the

1 accident." Compl. ¶ 15. Defendants did not respond to this
2 letter.

3 In June 2009, Rawlings again contacted Mr. Kohler, seeking
4 information about whether he had brought any claim regarding the
5 July 2008 accident and whether he had retained an attorney.
6 Defendants did not respond, notwithstanding that they apparently
7 had filed a complaint against Ms. Warren in San Francisco County
8 Superior Court on June 24, 2009.¹ See generally Kohler v. Warren,
9 Case No. CGC-09-489784 (S.F. Super. Ct.). On September 24, 2009,
10 Mercury Insurance Company, Ms. Warren's insurer, informed Rawlings
11 that The Dolan Law Firm was representing Mr. Kohler. The Dolan Law
12 Firm serves as Defendants' counsel in this case.

13 On or about September 30, 2009, Rawlings informed Defendants
14 that Aetna had a lien for medical benefits paid on behalf of Mr.
15 Dolan on funds that may be obtained through a settlement with Ms.
16 Warren and her insurer. On December 9, 2009, Defendants responded,
17 asking that Aetna withdraw its lien because Ms. Warren had
18 insufficient policy coverage and personal assets to make Mr. Kohler
19 whole. After receiving a letter from Rawlings asserting Aetna's
20 right to know of any settlement, Defendants responded by
21 reiterating their belief that the Plan could not recover any amount
22 from Mr. Kohler.

23 On June 28, 2010, Defendants informed Rawlings that they had
24 reached a settlement with Ms. Warren and her insurer. Mr. Kohler
25 had sought \$2 million from Ms. Warren. Under the parties'

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27 ¹ This was not alleged in Aetna's complaint, but rather
28 represented to be true by Defendants. It is offered here only to
provide further background. The Court's ruling does not rely on
it.

1 settlement agreement, Mr. Kohler would receive \$7,250.00 and Ms.
2 Kimseu Kohler would receive \$137,750.00, for a total of
3 \$145,000.00.

4 Aetna filed this action on January 28, 2011, asserting a claim
5 for equitable relief under section 502(a)(3) of ERISA. In
6 particular, Aetna asks the Court to impose a "constructive trust or
7 equitable lien agreement in favor of the Plan upon settlement
8 proceeds in possession of Defendants." Compl. ¶ 38a.

9 Defendants have submitted a copy of the docket sheet in the
10 state court action. The docket shows that, on February 3, 2011,
11 Defendants' counsel, on behalf of Defendants and Ms. Warren, filed
12 in the state court action an ex parte motion to interplead funds
13 related to the settlement, to discharge the liability of Ms. Warren
14 and her insurer, and to dismiss Defendants' claims against Ms.
15 Warren. The parties sought to interplead \$144,628.56, which was
16 the sum of the following amounts: \$6,878.56 held by Mr. Kohler,
17 \$37,750.00 held by Ms. Kimseu Kohler and \$100,000.00 held by
18 Mercury Insurance. The motion was granted, and \$144,628.56 is now
19 deposited with the state court.

20 LEGAL STANDARD

21 A complaint must contain a "short and plain statement of the
22 claim showing that the pleader is entitled to relief." Fed. R.
23 Civ. P. 8(a). When considering a motion to dismiss under Rule
24 12(b)(6) for failure to state a claim, dismissal is appropriate
25 only when the complaint does not give the defendant fair notice of
26 a legally cognizable claim and the grounds on which it rests.
27 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In
28 considering whether the complaint is sufficient to state a claim,

1 the court will take all material allegations as true and construe
2 them in the light most favorable to the plaintiff. NL Indus., Inc.
3 v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this
4 principle is inapplicable to legal conclusions; "threadbare
5 recitals of the elements of a cause of action, supported by mere
6 conclusory statements," are not taken as true. Ashcroft v. Iqbal,
7 __ U.S. __, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550
8 U.S. at 555).

9 DISCUSSION

10 Defendants argue that Aetna's claim must be dismissed because
11 it is not for "appropriate equitable relief." Alternatively,
12 Defendants assert that this case should be dismissed pursuant to
13 Colorado River Water Conservation District v. United States, 424
14 U.S. 800 (1976).

15 I. Appropriate Equitable Relief

16 Section 502(a)(3) of ERISA permits a plan fiduciary to bring a
17 civil action "(A) to enjoin any act or practice which violates any
18 provision of this subchapter or the terms of the plan, or (B) to
19 obtain other appropriate equitable relief (i) to redress such
20 violations or (ii) to enforce any provisions of this subchapter or
21 the terms of the plan." 29 U.S.C. § 1132(a)(3). To state a claim
22 for equitable relief, a plan must "(1) specifically identify a
23 fund, distinct from the beneficiary's general assets, from which
24 reimbursement will be taken, and (2) specify a particular share to
25 which the plan is entitled." Administrative Comm. for Wal-Mart
26 Stores, Inc. Assocs.' Welfare Plan v. Salazar, 525 F. Supp. 2d
27 1103, 1111 (D. Ariz. 2007) (citing Sereboff v. Mid-Atl. Med.
28 Servs., 547 U.S. 356, 362-63 (2006)); see also Cigna Corp. v.

1 Amara, ___ U.S. ___, 2011 WL 1832824, at *10.

2 As noted above, Aetna seeks to impose a constructive trust or
3 equitable lien on any settlement proceeds obtained by Defendants.
4 Defendants advance various arguments, which appear to fall into two
5 categories: (1) "Aetna is not 'doing equity,'" Mot. at 4:2, and
6 therefore equitable relief is not appropriate; and (2) Aetna seeks
7 an amount that exceeds the amount to which it is entitled under the
8 Plan.² None of these arguments is availing.

9 A. "Doing Equity"

10 Defendants point to the "the time-honored maxim that '[h]e who
11 seeks equity must do equity.'" In re Gardenhire, 209 F.3d 1145,
12 1152 n.11 (9th Cir. 2000) (quoting McQuiddy v. Ware, 87 U.S. 14, 19
13 (1873)). However, they do not identify any inequitable act by
14 Aetna evident from the face of the pleadings that precludes it from
15 obtaining equitable relief.

16 First, Defendants contend that the Plan effected a "forced
17 waiver" of their "equitable defenses, including the make whole
18 doctrine." Mot. at 3:15-16, 4:1. The make-whole doctrine is not
19 an equitable defense. It is a federal common law rule that
20 provides that "absent an agreement to the contrary, an insurance
21 company may not enforce a right to subrogation until the insured
22 has been fully compensated for her injuries, that is, has been made
23 whole." Barnes v. Indep. Auto. Dealers Ass'n of Cal. Health &
24 Welfare Benefit Plan, 64 F.3d 1389, 1394 (9th Cir. 1995). The
25 make-whole doctrine is a federal common-law rule of contract

26
27 ² Defendants also contend that public policy justifies
28 dismissing Aetna's claim because it has a chilling effect on "the
ability of personal injury claimants to obtain representation."
Mot. at 7:10-11. This argument does not warrant dismissal.

1 interpretation. It is a "gap-filler" that applies only if the
2 contract's subrogation clause is silent with respect to the
3 insured's right to be made whole before the insurer may obtain
4 reimbursement for benefits paid. Thus, the parties may abrogate
5 the make-whole rule by providing that the insurer has "the right of
6 first reimbursement out of any recovery the insured [is] able to
7 obtain, even if [the insured is] not made whole." Id. at 1395.

8 Here, the "First-Priority Claim" provision of the SPD provides
9 that the Plan is entitled "to full reimbursement on a first-dollar
10 basis from any Responsible Party's payments, even if such payment
11 to the plan will result in a recovery to the Covered Person which
12 is insufficient to make the Covered Person whole or to compensate
13 the Covered Person in part or in whole for the damages sustained."
14 Compl., Ex. A, at 41. This language obviates the need to resort to
15 the gap-filling make-whole doctrine. Defendants do not identify
16 any authority that precludes Aetna from seeking equitable remedies
17 simply because Aetna's recovery may exhaust settlement proceeds.³
18 District courts, including this one, have permitted insurers to
19 assert equitable claims under section 502(a)(3), notwithstanding
20 the inapplicability of the make-whole doctrine. See, e.g., CGI
21 Techs. & Solutions, Inc. v. Rose, 2011 WL 197772, at *4 (W.D.
22 Wash.) (concluding that plan may assert equitable lien against
23 insured, despite non-operation of make-whole doctrine); Pioneer
24 Title Co. Employee Welfare Benefits Trust v. Tague, 2009 WL
25 1687966, at *6 (D. Idaho); Bd. of Trustees for Laborers Health &

27 ³ Although Defendants' argument suggests they believe the
28 First-Priority Claim provision to be unconscionable, they cite no
authority to support this position.

1 Welfare Trust Fund for N. Cal. v. Hill, 2008 WL 5047705, at *4
2 (N.D. Cal.). Thus, that Mr. Kohler may not be made whole does not
3 require dismissal of Aetna's claim.

4 Defendants also argue that Aetna is not "doing equity"
5 because, under the "common fund doctrine," their counsel's right to
6 fees should take priority over Aetna's claim. Under this doctrine,
7 "'a litigant or a lawyer who recovers a common fund for the benefit
8 of persons other than himself or his client is entitled to a
9 reasonable attorney's fee from the fund as a whole.'" Staton v.
10 Boeing Co., 327 F.3d 938, 967 (9th Cir. 2003) (quoting Boeing Co.
11 v. Van Gemert, 444 U.S. 472, 478 (1980)). According to the Supreme
12 Court, the "doctrine rests on the perception that persons who
13 obtain the benefit of a lawsuit without contributing to its cost
14 are unjustly enriched at the successful litigant's expense." Van
15 Gemert, 444 U.S. at 478. However, the Plan's terms provide that,
16 if a party accepted benefits, that party agreed that the Plan "is
17 not required to participate in or pay court costs or attorneys fees
18 to any attorney hired by the Covered Person to pursue the Covered
19 Person's damage claim." Compl., Ex. A, at 41. Thus, the common
20 fund doctrine does not require dismissal of Aetna's claim, in whole
21 or in part.

22 Finally, Defendants contend that Aetna is not "doing equity"
23 because they and their attorneys may receive nothing from the
24 settlement with Ms. Warren and her insurer if Aetna were to
25 prevail. However, Defendants offer no authority that this result
26 precludes Aetna from pursuing equitable relief.

27 B. Amount of Aetna's Entitlement

28 As noted above, Aetna seeks \$147,986.76 for monies it paid to

1 cover Mr. Kohler's medical expenses. Defendants contend that this
2 amount exceeds Aetna's entitlement under the Plan's terms and that
3 its claim should be dismissed in whole or in part.

4 Defendants cite a portion of the Eleventh Circuit's decision
5 in Popowski v. Parrott, in which that court concluded that, under
6 Sereboff, a plan's ERISA equitable relief claim failed because the
7 plan's terms failed to "specify that recovery come from any
8 identifiable fund or to limit that recovery to any portion
9 thereof." 461 F.3d 1367, 1374 (11th Cir. 2006). There, the plan
10 sought to be reimbursed "in full, and in first priority, for any
11 medical expenses paid by the Plan relating to the injury or
12 illness." Id. at 1371. Here, under the Plan, Aetna's recovery is
13 limited to "all the amounts the plan has paid and will pay as a
14 result of that injury, illness, or condition, up to and including
15 the full amount the Covered Person receives from any Responsible
16 Party." Compl., Ex. A, at 40. This language sufficiently limits
17 Aetna's claim to an identifiable fund and a portion of it. See,
18 e.g., Pioneer Title, 2009 WL 1687966, at *5; Admin. Cmte. for Wal-
19 Mart Stores, 525 F. Supp. 2d at 1112 n.7. Thus, Popowski does not
20 require dismissal.

21 Defendants also argue that Aetna may not recover any amount
22 from Ms. Kimseu Kohler because she is not a "Covered Person" as
23 defined by the Plan. However, the Plan provides that a "lien may
24 be enforced against any party who possesses the funds or proceeds
25 representing the amount of benefits paid by the plan including,
26 but not limited to, the Covered Person, . . . and/or any other
27 source possessing funds representing the amount of the benefits
28 paid by the plan." Compl., Ex. A, at 41. Aetna alleges that Ms.

1 Kimseu Kohler received amounts under the settlement agreement. The
2 Plan's language and this allegation support Aetna's claim against
3 Ms. Kimseu Kohler.

4 Finally, Defendants contend that Aetna should recover no more
5 than an amount proportional to what Defendants received in the
6 settlement in relation to what they valued Mr. Kohler's claim to
7 be. They cite Arkansas Department of Health Services v. Ahlborn,
8 547 U.S. 268 (2006), which concerned a state health agency's lien
9 against a Medicaid recipient's settlement proceeds. However,
10 Defendants identify nothing in the Ahlborn decision that supports
11 dismissal of Aetna's claim, either in whole or in part.

12 Accordingly, Aetna states a cognizable claim for equitable
13 relief under ERISA.

14 II. Dismissal under the Colorado River Doctrine

15 In situations involving the contemporaneous exercise of
16 jurisdiction by different courts over sufficiently parallel
17 actions, a federal court has discretion to stay or dismiss an
18 action based on considerations of wise judicial administration,
19 giving regard to conservation of judicial resources and
20 comprehensive disposition of litigation. Colorado River, 424 U.S.
21 at 817. The two actions need not exactly parallel each other to
22 implicate the Colorado River doctrine; it is enough that the two
23 cases are substantially similar. Nakash v. Marciano, 882 F.2d
24 1411, 1416 (9th Cir. 1989). The mere presence of additional
25 parties or issues in one of the cases will not necessarily preclude
26 a finding that they are parallel. Caminiti & Iatarola, Ltd. v.
27 Behnke Warehousing, Inc., 962 F.2d 698, 700-701 (7th Cir. 1992);
28 see also Interstate Material Corp. v. City of Chicago, 847 F.2d

1 1285, 1288 (7th Cir. 1988) (noting that the requirement is for
2 parallel suits, not identical ones).

3 The federal district courts have a "virtually unflagging
4 obligation" to exercise their jurisdiction, Moses H. Cone Hosp. v.
5 Mercury Constr. Corp., 460 U.S. 1, 19 (1983), and should only
6 invoke a stay or dismissal under the Colorado River doctrine in
7 "exceptional circumstances," Colorado River, 424 U.S. at 817. In
8 Colorado River, the Supreme Court announced a balancing test
9 weighing four factors to determine whether sufficiently exceptional
10 circumstances exist: (1) whether either court has assumed
11 jurisdiction over property in dispute; (2) the relative convenience
12 of the forums; (3) the desirability of avoiding piecemeal
13 litigation; and (4) the order in which the concurrent forums
14 obtained jurisdiction. 424 U.S. at 818. The Court stated: "No one
15 factor is necessarily determinative; a carefully considered
16 judgment taking into account both the obligation to exercise
17 jurisdiction and the combination of factors counselling against
18 that exercise is required." Id. at 818-19.

19 Defendants do not present exceptional circumstances that
20 warrant dismissal under Colorado River or abstention. That the
21 funds at issue are deposited with the state court does not mandate
22 dismissal. Notably, Defendants sought to interplead those funds
23 only after this action was filed.

24 Accordingly, Defendants' motion to dismiss pursuant to
25 Colorado River is denied.

26 CONCLUSION

27 For the foregoing reasons, the Court DENIES Defendants' motion
28 to dismiss. (Docket No. 12.) Aetna's motion to strike portions of

1 Defendants' motion to dismiss is DENIED as moot. (Docket No. 17.)

2 A case management conference will held on July 12, 2011 at
3 2:00 p.m.

4 IT IS SO ORDERED.

5 Dated: 5/23/2011


6 CLAUDIA WILKEN
7 United States District Judge
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